DISTRICT COURT OF GUAM
TERRITORY OF GUAM

SURENDRANI HILL,

Plaintiff,

vs.

BOOZ ALLEN HAMILTON, INC.,

Defendants.

Civil Case No. 07-00034

ORDER RE: (1) PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT; (2) DEFENDANT'S MOTION TO DISMISS

This matter is before the court on two motions: (1) Defendant's Motion to Dismiss, and (2) Plaintiff's "Motion to Amend First Amended Complaint." *See* Docket Nos. 47 and 60.[1] Having reviewed the parties' submissions and the relevant authorities, the court **GRANTS** Plaintiff's Motion to Amend, **DENIES AS MOOT** Defendant's Motion to Dismiss, and enters the following decision and order.

I. FACTUAL BACKGROUND

In or around April of 2003, Defendant Booz Allen Hamilton ("BAH") hired Plaintiff Surendrani "Sue" Hill to provide "support services" at Norton and March Air Force Bases in California. Docket No. 26 ("First Amended Complaint" or "FAC") at ¶5. Plaintiff served in this

[1] The court found these motions suitable for decision without oral argument. *See* Local Civ. R. 7.1 (reposing in court discretion to decide motions "on the basis of the written materials on file," even if parties have requested oral argument). The court considered them together because of their obvious relation, and considered Plaintiff's motion first because it believed that motion would remain in play no matter how the court were to resolve Defendant's motion.

capacity at these locations for about two years, until her transfer to Andersen Air Force Base on Guam in 2005. *Id.*

Toward the end of June of 2005, Defendant designated Plaintiff a Global Engineering Integration and Technical Assistance contractor ("GEITA"). Docket No. 26 at ¶6. Plaintiff's then-supervisor told her that holding this position entailed the following duties: ensuring that the study/remediation sub-contractor, EA Engineering ("EA"), kept to Standard Operating Procedures ("SOPs"); providing the Air Force ("AF") with "quality" deliverables; and maintaining the AF mission and goals in environmental clean-up projects proceeding under the Installation Restoration Program ("IRP"). *Id*.

Plaintiff's basic factual narrative is that, in the course of carrying out her duties, she saw evidence of failures and possible acts of fraud by EA and by Defendant; that she brought this evidence to the attention of her supervisors; that her supervisors were unwilling to confront and act on this evidence; and that she was ultimately fired for her quality-control actions. Docket No. 26 at ¶¶7-19.

Thus, she alleges that in July of 2005 she determined that EA's "document deliverable" was of substandard quality, and that "[a]lthough at first [her supervisor] appeared to listen and agree with Plaintiff that the documents were not up to standard, he soon started acting as a shield for EA by running interference whenever Plaintiff provided any negative feedback on EA's work." Docket No. 26 at ¶8.

Further, she alleges that around the end of 2005, she determined that EA was "double billing" and brought this to her supervisor's attention, only to be told in April of 2006 that "although she was deemed technically capable by their client (the Air Force staff at ISP), her attitude towards [EA] was 'unacceptable' according to [Defendant's] core values," and "that she was being placed on a tentative one-month probation and that she would be terminated if she did not improve her relationship with EA." *Id*. at ¶¶10-12.

Finally, she alleges that after presenting spreadsheets "itemiz[ing] these billing discrepancies" to her supervisors on May 11, 2006, she was informed the following day that she

was to be terminated because "she had made only small improvements" after being put on probation, notwithstanding the fact her supervisor had earlier assured her "on two separate occasions . . . that he was getting positive feedback on her progress." *Id*. at ¶¶12-13.

II. PROCEDURAL BACKGROUND

The procedural history in this case is a bit involved. On June 21, 2007, Plaintiff initiated this action in the United States District Court for the Central District of California, by filing a complaint alleging (1) wrongful retaliatory termination, in violation of Section 1102.5 of the California Labor Code, and (2) wrongful termination in violation of public policy, based on the policies underlying Section 1102.5 of the California Labor Code as well as the California Fair Employment and Housing Act. Docket No. 1. On July 17, 2007, Defendant moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and also moved to strike portions of the complaint. Docket Nos. 7-10. On August 23, 2007, the Central District granted Defendant's motion as to the first claim (on account of failure to exhaust administrative remedies) and denied it as to the second claim, and denied the motion to strike as moot. Docket No. 16.

On September 7, 2007, Plaintiff filed her FAC. Docket No. 26. On October 22, 2007, Defendant moved to transfer this case to this court, pursuant to Section 1404(a) of Title 28, United States Code. Docket No. 28. The Central District granted this motion, over Plaintiff's opposition, on November 20, 2007. *See* Docket Nos. 35, 36.

On June 23, 2008, Defendant moved to dismiss the FAC. Docket Nos. 47, 48. On September 5, 2008, Plaintiff opposed Defendant's motion to dismiss. Docket No. 57. Defendant replied to Plaintiff's opposition on September 12, 2008. Docket No. 58.

Finally, on October 22, 2008—*i.e.*, before the court had decided Defendant's motion to dismiss the FAC—Plaintiff moved for leave to file a Second Amended Complaint ("SAC") pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. Docket No. 60. On November 19, 2008, Defendant opposed this motion. Docket No. 64. Plaintiff replied to Defendant's opposition on November 26, 2008. Docket No. 65.

III. APPLICABLE STANDARDS

Rule 15 of the Federal Rules of Civil Procedure deals with amendments and supplements to pleadings. It provides for two types of amendment: matter-of-course amendment and discretionary amendment. As to the first type, "[a] party may amend its pleading once as a matter of course before being served with a responsive pleading, or within 20 days after serving the pleading if a responsive pleading is not allowed . . . ." Fed. R. Civ. P. 15(a)(1)(A)-(B). This type of amendment does not depend in any way on the court's permission. As to the second type of amendment, after a party has made its one matter-of-course amendment, it may amend its pleading "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). However, "[t]he court should freely give leave when justice so requires." *Id.*

Cases testing the application of Rule 15 show that the "when justice so requires" requirement is very easily satisfied. The Supreme Court has stated that the mandate of "freely give[n]" leave "is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (internal citation omitted). Apparently intensifying this rule, the Ninth Circuit has stated that the Rule 15 policy favoring amendments "is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003); *see also Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (same); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (same); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (same).

Courts rely on the following factors, usually in combination, to justify denial of leave to amend: (1) bad faith or dilatory motive; (2) undue delay; (3) repeated failure to cure deficiencies by previous amendments; (4) prejudice to the opposing party; and (5) futility of amendment. *Foman*, 371 U.S. at 182; *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

These factors are not equally consequential. Undue delay alone "is insufficient to justify denying a motion to amend." *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). *But see*

AmerisourceBergen Corp. v. Dialysist West, Inc., 465 F.3d 946, 953 (unexplained delay alone may be a sufficient basis for denying leave to amend if particularly egregious). Conversely, prejudice to the opposing party is the most important factor; indeed, "[it] is the 'touchstone of inquiry under rule 15(a).'" *Eminence Capital, LLC*, 316 F.3d at 1052 (*quoting Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001)). *See also Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973) ("the crucial factor is the resulting prejudice to the opposing party"). The party opposing amendment "bears the burden of showing [such] prejudice." *DCD Programs*, 833 F.2d at 186-87. Moreover, to justify denial of leave to amend, such prejudice must be "substantial." *Morongo Band of Mission Indians*, 893 F.2d at 1079. "Absent [substantial] prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, LLC*, 316 F.3d at 1052 (emphasis in original).

Finally, grant or denial of leave to amend is reviewed for abuse of discretion. *Swanson v. United States Forest Service*, 87 F.3d 339, 343 (9th Cir. 1996). Denying leave to amend without offering a supporting explanation is "not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman*, 371 U.S. at 182; *see also Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292-93 (9th Cir. 1983) ("where the record does not clearly dictate the district court's denial, we have been unwilling to affirm absent written findings").

IV. ANALYSIS

"The party seeking leave to amend need only establish the reason why amendment is required ('justice' so requires). The burden is then on the party *opposing* the motion to convince the court that 'justice' requires *denial*." Schwarzer et al., *Rutter Group Practice Guide: Federal Civil Procedure Before Trial* ¶8:415 (9th Circuit ed. 2008) (emphasis in original). Typical reasons for amendment "are discovery of additional information; correction of a misnomer or other error; or to cure a defect in the original pleading, such as a defect in the jurisdictional allegations." *Id*. ¶8:409.

A. Plaintiff Establishes A Presumption in Favor of Amendment

Plaintiff states at least two reasons for amendment (though she does not do so explicitly). First, she states that she "seeks to amend her First Amended Complaint to add two Guam statutes to her violation of public policy claim should it be determined that Guam law applies to her claims."[2] Docket No. 60 at 3. This reason is analogous to the discovery of additional information, in that it suggests amendment is proper given an unanticipated legal setting.

It is certainly arguable that this analogy is not a good one—given the facts of her case, Plaintiff might possibly have foreseen that Guam law might apply to her claims, in which case the present legal context could not be said to be "unanticipated." However, the operative complaint—which only makes claims based on California law—was filed around September 7, 2007, when the case was still venued in the Central District of California, and when Plaintiff had other counsel. *See* Docket No. 26. Thus, Plaintiff originally conceived of this case as proceeding in California and under California law. Only on Defendant's motion was the case transferred here, and only Defendant has argued that Guam law might apply to this case. *See* Docket Nos. 28 (Defendant's motion to transfer); 48 (urging application of Guam law to this case); 58 (same). Moreover, while it is perhaps true that Plaintiff *could* have anticipated this case's transfer to Guam and the possible application of Guam law, that is not to say that Plaintiff *should* have anticipated the transfer and application of Guam law.

In short, given the procedural background of this case, Plaintiff's first reason for seeking leave to amend—to add Guam law claims to a complaint originally filed in California, and only brought to this court on Defendant's motion—is consistent with what "justice . . . requires." Thus, Plaintiff has established a presumption in favor of amendment. Moreover, since Plaintiff has established this presumption, her second reason for granting leave to amend need not be analyzed.

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[2] At this time, the court expressly declines to decide whether Guam law does in fact apply to Plaintiff's claims, in whole or in part.

B. Defendant Does Not Rebut the Presumption Favoring Amendment

Since Plaintiff has established the presumption favoring amendment, it is up to Defendant "to convince the court that 'justice' requires *denial*." Schwarzer et al., *Rutter Group Practice Guide* at ¶8:415. Again, the established grounds for denying leave to amend are: (1) bad faith or dilatory motive; (2) undue delay; (3) repeated failure to cure deficiencies by previous amendments; (4) prejudice to the opposing party; and (5) futility of amendment. *Foman*, 371 U.S. at 182; *Moore*, 885 F.2d at 538.

When using these factors in an analysis, though, it is important to note that they "are not to be understood rigidly or applied mechanically; courts are instead counselled [*sic*] to 'examine each case on its facts' and gauge the propriety of granting leave to amend accordingly." *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002) (*quoting* 6 Wright et al., *Federal Practice and Procedure* § 1430).

Defendant argues that leave to amend should be denied on all five grounds.

1. Bad Faith or Dilatory Motive

Leave to amend may be denied on the basis of "bad faith or dilatory motive" if the court determines that the movant has some improper purpose in seeking amendment—*e.g.*, to create delay, or to defeat the court's jurisdiction. *Foman*, 371 U.S. at 182; *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987); Schwarzer et al., *Rutter Group Practice Guide* at ¶8:421.

Here, Defendant argues that Plaintiff's motion to amend was filed in bad faith because Plaintiff filed her motion while "facing, for the second time, a dispositive motion," and "[c]ourts have previously found that filing a motion to amend in the face of a dispositive motion was evidence that 'the motion was filed in bad faith and with dilatory motives [*sic*].'" Docket No. 64 at 4:17-18, 21-23 (*quoting Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993) and *citing Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999); *E.E.O.C. v. Boeing Co.*, 843 F.2d 1213, 1222 (9th Cir. 1988); *Modafferi v. Gen'l Instrument Corp.*, 1991 WL 527677 (S.D. Cal. Feb 21, 1991)). Defendant also argues that Plaintiff's motion to amend is "a dilatory tactic" because it seems likely to require changes to "the current Motions

schedule." Docket No. 64 at 7:15-18.

The court rejects these arguments. Defendant's first argument amounts to the claim that filing a motion to amend in the face of a dispositive motion is necessarily evidence of bad faith. The cited cases do not stand for such a broad proposition. In every one of those cases, the dispositive motion is one for summary judgment, not one under Rule 12(b)(6) of the Federal Rules of Civil Procedure, such as we have here. A motion to amend filed in the face of a summary judgment motion could be taken to demonstrate bad faith because it imposes potentially considerable costs upon the court and opposing party in terms of re-formulated litigation strategies, re-opened discovery, scheduling adjustments, and so on. The Rule 12(b)(6) context differs dramatically because such costs have not yet been incurred—or, if they have been incurred, are of minimal consequence.

Defendant's second argument, that Plaintiff's motion to amend is "a dilatory tactic," fails because it ignores the fact that the court can always modify its scheduling orders under Rule 16(b) of the Federal Rules of Civil Procedure. *See Abels v. JBC Legal Group*, 229 F.R.D. 152, 156-57 (N.D. Cal. 2005) (rejecting argument that prejudice would follow from change to scheduling order if amendment allowed).

Therefore, the court rejects Defendant's claim that Plaintiff's filing a motion to amend in the face of a Rule 12(b)(6) motion necessarily evinces bad faith. Further, the court sees no reason to believe that Plaintiff had any sort of improper purpose in seeking amendment, such as creating delay or defeating the court's jurisdiction. As such, Defendant fails to establish the "bad faith or dilatory motive" ground for denying leave to amend.

2. Undue Delay

The court also rejects Defendant's "undue delay" arguments. Analysis of this factor may go in different ways. In general, "[t]o show undue delay, the opposing party must at least show delay past the point of initiation of discovery; even after that time, courts will permit amendment provided the moving party has a reasonable explanation for the delay." *SAES Getters S.p.A.*, 219 F. Supp.2d at 1086. Defendant does not speak to this concept of "undue delay"—perhaps

because, as Defendant notes, "discovery in this case has barely begun." Docket No. 65 at 3:3. Rather, Defendant "has ample time to seek discovery relevant to the new claim and allegations in the proposed Second Amended Complaint." *Id*. at 3:8-9.

Defendant proposes a slightly different analysis of this factor. As Defendant notes, "[i]n assessing timeliness, [the Ninth Circuit does] not merely ask whether a motion was filed within the period of time allotted by the district court in a Rule 16 scheduling order. Rather, in evaluating undue delay, [the Ninth Circuit] inquire[s] 'whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.'" *AmerisourceBergen Corp.*, 465 F.3d at 953 (*quoting Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990). In general, "[t]o show undue delay, the opposing party must at least show delay past the point of initiation of discovery; even after that time, courts will permit amendment provided the moving party has a reasonable explanation for the delay." *SAES Getters S.p.A.*, 219 F. Supp.2d at 1086.

Here, Defendant argues that Plaintiff has unduly delayed in seeking leave to amend her complaint because she knew all the "facts giving rise to her proposed amendment as of May, 2006 when she was terminated, and clearly by June 27, 2007, when she filed her initial Complaint." Docket No. 64 at 6:20-22. Relatedly, Defendant argues that Plaintiff has unduly delayed in seeking to amend her complaint because she has not offered any explanation "why the allegations in the proposed SAC were not included in her FAC." *Id*. at 6:23-24.

As stated, the court rejects these arguments. As to the first argument, Defendant elides the facts that it was responsible for effecting the change of venue, and the ensuing change in Plaintiff's counsel, and that it has argued vehemently for the application of Guam law instead of California law to Plaintiff's claims. *See* Docket Nos. 28 (Defendant's motion to transfer); 48 (urging application of Guam law to this case); 58 (same). To recapitulate an earlier statement, while Plaintiff perhaps *could* have anticipated these shifting circumstances, it is hard to see how Plaintiff *should* have anticipated them. And since these shifting circumstances constitute the grounds for Plaintiff's motion, as discussed above, it cannot be said that Plaintiff "knew or

should have known the facts *and theories* raised by the amendment in the original pleading"—after all, the original pleading was filed when Plaintiff had a different lawyer, and when she thought her case was to proceed under California law in the Central District of California.

As to the second argument, Defendant intimates that Plaintiff is under some obligation to explain "why the allegations in the proposed SAC were not included in her FAC." This is incorrect. Once a plaintiff successfully raises a presumption favoring amendment, it is the defendant's burden to demonstrate why justice requires that the amendment not be allowed, with the "undue delay" factor being part of that demonstration. Thus, it is Defendant's job to establish undue delay; conversely, it is *not* Plaintiff's job to pre-emptively adduce evidence tending to negate undue delay.

Therefore, the court also rejects Defendant's claim that Plaintiff has unduly delayed in seeking leave to amend her complaint. As such, Defendant has failed to establish the "undue delay" ground for denying leave to amend.

3. Repeated Failure to Cure Deficiencies

A court's discretion to deny leave to amend is especially broad "when the court has already given a plaintiff one or more opportunities to amend his complaint." *Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980).

Here, Defendant encourages the court to exercise that broad discretion to deny leave to amend, in light of the fact that Plaintiff has already amended her complaint once. *See* Docket No. 64 at 4:1-10 (*citing Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990); *Fidelity Fin. Corp. v. Fed'l Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986)).

This factor has little or no weight, as Defendant's cited cases are eminently distinguishable. In both cases, the court denied leave to file a *fourth* amended complaint. *See Allen*, 911 F.2d at 373; *Fidelity Fin. Corp.*, 792 F.2d at 1438. In this case, though, Plaintiff seeks leave to file a *second* amended complaint. A setting in which a plaintiff seeks to file a second amended complaint is hardly comparable, in terms of "failure," to one in which a plaintiff has

filed a third amended complaint and *still* cannot find a cause of action. Also, in each of Defendant's cited cases there were factual or procedural circumstances making the failure all the more egregious. For instance, in *Allen*, the plaintiff was "a 14-year veteran attorney for the City and self-described 'literary father' of much of the City's code." *Allen*, 991 F.2d at 373. That the plaintiff *himself* had such expertise made it hard for the court to understand his inability to state a claim. And in *Fidelity*, the plaintiff sought to file its fourth amended complaint *after* the district court had announced its decision to grant summary judgment for the defendant. *Fidelity Fin. Corp.*, 792 F.2d at 1438. That procedural setting is vastly more prejudicial than the one Defendant faces here.

Therefore, the court also rejects Defendant's suggestion that Plaintiff's previous failures to cure deficiencies in her pleading should weigh against her motion to amend. As such, Defendant has failed to establish the "repeated failure to cure deficiencies" ground for denying leave to amend.

4. Prejudice

As stated above, prejudice to the opposing party is far and away the most important factor in analyzing Defendant's opposition to Plaintiff's motion to amend, since "[it] is the 'touchstone of inquiry under rule 15(a).'" *Eminence Capital, LLC*, 316 F.3d at 1052. To show prejudice, "[t]here must be some showing of *inability to respond* to the proposed amendment." Schwarzer et al., *Rutter Group Practice Guide* at ¶8:426 (emphasis in original). This "inability to respond" is usually found where the time for discovery has expired, or where the litigation has progressed to the point that the opposing party has already invested substantial time and resources in developing legal theories that would be (wastefully) outmoded by the amendment. *See id.* at ¶¶8:424.1-25. For example, the Ninth Circuit has found such prejudice where the claims sought to be added "would have greatly altered the nature of the litigation and would have required defendants to have undertaken, at a late hour, an entirely new course of defense." *Morongo Band of Mission Indians*, 893 F.2d at 1079.

The opposing party "bears the burden of showing prejudice." *DCD Programs*, 833 F.2d

at 186-8. To justify denial of leave to amend, such prejudice must be "substantial." *Morongo Band of Mission Indians*, 893 F.2d at 1079. "Absent [substantial] prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, LLC*, 316 F.3d at 1052 (emphasis in original).

Here, Defendant argues that "[t]he proposed amendment will prejudice [it] by forcing it to defend a case now containing Federal and California causes of action, as well as a cause of action based on the law of Guam." Docket No. 64 at 7:7-9. Defendant does not say how exactly this constitutes prejudice, other than to say that "the prejudice against Defendant is obvious." *Id*. at 7:13.

The court does not agree that prejudice is "obvious" here. Defendant cites no cases in support of its view that being "forc[ed] to defend a case" containing causes of action under different bodies of law constitutes prejudice. Moreover, because Defendant carries out business activities in California and Guam, it cannot be surprised—that is to say, *prejudiced*—to find itself subject to litigation proceeding under the laws of those jurisdictions.

In fact, if Defendant truly thought it unfair that it should be subject to litigation proceeding under either set of laws, then it ought to have objected to the exercise of personal jurisdiction in either of those forums. That Defendant made no such objection suggests that it suspected the "minimum contacts" test would be satisfied in both places, meaning that "(1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) (*quoting Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)). Defendant should not be heard to raise fairness-related doubts on these points when it has waived its opportunity to do so in the procedurally appropriate manner. *See* Fed. R. Civ. P. 12(h)(1).

Similarly, to the extent that Defendant's concerns stem from the prospect of a claim based

in Guam law, Defendant should not be heard to complain, since Defendant *itself* effected the change of venue in this case, and has argued vehemently for the application of Guam law instead of California law to Plaintiff's claims. *See* Docket Nos. 28 (Defendant's motion to transfer); 48 (urging application of Guam law to this case); 58 (same).

Since Defendant makes no showing of prejudice—let alone *substantial* prejudice—the court rejects Defendant's argument that it would be prejudiced if the court were to grant Plaintiff's motion to amend. As such, Defendant has failed to establish the "prejudice" ground for denying leave to amend.

5. Futility

The final part of the analysis has to do with whether the proposed amendment would be "futile." Challenges to pleadings are usually deferred until after leave to amend is granted and the amended pleading filed. *Netbula, LLC v. Distinct Corp*., 212 F.R.D. 534, 549 (N.D. Cal. 2003); *SAES Getters S.p.A.*, 219 F. Supp. 2d at 1086. However, a proposed amendment may be denied as "futile" if "no set of facts can be proved under the amendment that would constitute a valid claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). Denials based solely on futility "are rare." Schwarzer et al., *Rutter Group Practice Guide* at ¶8:423.

Here, Defendant argues that the proposed amendment would be futile because it only alleges wrongdoing by a sub-contractor of the employer (*i.e.*, of Defendant), while "the 'employer' must be the wrong-doer to successfully state a claim for retaliation under the False Claims Act." Docket No. 64 at 9:9-11 (*citing Mendiondo v. Centinela Hosp. Med. Ctr*., 521 F.3d 1097, 1103 (9th Cir. 2008)).

This argument is wrong. Contrary to what Defendant says, *Mendiondo* does *not* state that the False Claims Act ("FCA") protects only whistleblowers investigating possible wrongdoing *by their employers*—in fact, the issue of legally cognizable wrongdoer identity was not even before the *Mendiondo* court. And, as Plaintiff notes, courts that *have* addressed this issue have held that "the [FCA] protects employees who are retaliated against for investigating or prosecuting FCA

actions against their employers and third parties," rather than just "those whistleblowers who investigate matters which could lead to a viable FCA action against their employers." *U.S. ex rel. Satalich v. City of Los Angeles*, 160 F. Supp. 2d 1092, 1108-09 (C.D. Cal. 2001) (holding that plaintiff had adequately stated an FCA claim by alleging that he was fired after bringing subcontractor's allegedly fraudulent conduct to the attention of his employer, a municipality). *See also Nguyen v. City of Cleveland*, 121 F. Supp. 2d 643, 648-49 (N.D. Ohio 2000) (holding that the FCA "reaches an employer who discriminates against an employee, at the behest of or on behalf of another, when it is the other that seeks to retaliate against the employee for protected conduct").

What *Mendiondo does* state is that "[a] plaintiff alleging a FCA retaliation claim must show three elements: (1) that he or she engaged in activity protected under the statute; (2) that the employer knew the plaintiff engaged in protected activity; and (3) that the employer discriminated against the plaintiff because he or she engaged in protected activity." *Mendiondo*, 521 F.3d at 1103. Engaging in "protected activity" means (i) having a reasonable belief that someone was possibly committing fraud against the government, and (ii) investigating that possible fraud. *Id*. at 1104.

In her proposed SAC (attached to Docket No. 60), Plaintiff adequately pleads facts in accordance with these elements. As to element (1), Plaintiff describes her reasonable belief in possibly fraudulent billing activities by Defendant and its sub-contractor, EA Engineering, and her investigations into these activities. *See* Docket No. 60, proposed SAC attachment, at ¶¶11-14. As to element (2), Plaintiff states that she presented the findings of her investigations to her employer on May 11, 2006. *See id*. at ¶14. This allegation sufficiently pleads that her employer knew she was engaged in protected activity. *See Mendiondo*, 521 F.3d at 1104. Finally, as to element (3), Plaintiff states that Defendant terminated her because she "investigated, reported, complained about, took actions to expose, and refused to cover up [Defendant's] billing practices amounting to fraud against the United States government." Docket No. 60, proposed SAC attachment, at ¶19. At the pleading stage of an FCA case, it suffices for a plaintiff to simply give

notice that she believes she was terminated because of her investigations into the practices specified in the complaint. *See Mendiondo*, 521 F.3d 1104.

In sum, Plaintiff adequately states a cause of action under the FCA in her proposed SAC. Thus, the proposed amendment would not be "futile," and Defendant has failed to establish the "futility" ground for denying leave to amend.

V. CONCLUSION

In light of the foregoing analysis, Plaintiff's Motion to Amend is **GRANTED**. Since Defendant's Motion to Dismiss is no longer addressed to the operative complaint, that motion is **DENIED AS MOOT**. Plaintiff shall file her Second Amended Complaint by January 23, 2009.

SO ORDERED.

/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Jan 16, 2009